(11)

Supreme Court, U.S.
FILED
SEP 20 2000
CLERK

No. 00-38

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

KIM HO MA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

12 PP

TABLE OF AUTHORITIES

Cases:	Page
Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984)	10
Ho v. *Greene*, 204 F.3d 1045 (10th Cir. 2000)	1, 2
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999)	10
Ngo v. *INS*, 192 F.3d 390 (3d Cir. 1999)	2, 3
Zadvydas v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), petition for cert. pending, No. 99-7791	1, 3, 5
Statutes and regulation:	
8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998)	1
8 U.S.C. 1231(a)(6) (Supp. IV 1998)	1, 2, 3, 4, 6, 7, 8, 9, 10
8 C.F.R.:	
Section 241.4	4
Section 241.4(a)	8
Miscellaneous:	
65 Fed. Reg. 40,540 (June 30, 2000)	7
1997 Statistical Yearbook of the Immigration and Naturalization Service (Oct. 1999)	5

In the Supreme Court of the United States

No. 00-38

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

KIM HO MA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The court of appeals' ruling that the Attorney General is without authority under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain respondent beyond the 90-day removal period set forth in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998) contradicts the express language of Section 1231(a)(6), which provides that certain aliens—including aggravated felons and any alien who "has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal"—"*may be detained beyond the removal period*" (emphasis added). The Ninth Circuit's ruling squarely conflicts with the decision of the Tenth Circuit in *Duy Dac Ho* v. *Greene*, 204 F.3d 1045 (2000), which held that the Attorney General is authorized by Section 1231(a)(6) to detain such aliens and that that detention is constitutional. The result reached by the Ninth Circuit also cannot be reconciled with *Zadvydas* v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), petition for cert. pending, No. 99-7791, which sustained the continued detention of an alien under Section 1231(a)(6) in comparable circumstances. The ruling below significantly hinders the Attorney General's ability to enforce the immigration laws and to protect the public from criminal aliens in the Ninth Circuit, which covers a

substantial percentage of the aliens under final orders of removal who have been detained under Section 1231(a)(6). Review by this Court therefore is plainly warranted to determine the scope of the Attorney General's detention authority under Section 1231(a)(6).

1. Respondent concedes (Br. in Opp. 17, 22) that the Ninth Circuit's decision in this case squarely conflicts with the Tenth Circuit's decision in *Ho*. Respondent nonetheless contends (*id.* at 13, 17) that the Court should not resolve the conflict until the Tenth Circuit decides another case raising the issue. Respondent does not deny, however, that the Tenth Circuit's decision in *Ho* is final and constitutes binding precedent in that circuit. The circuit conflict therefore is ripe for review.[1] Moreover, the Third Circuit also has held that Section 1231(a)(6) authorizes the detention of aliens beyond the 90-day removal period even though they cannot be promptly removed. *Chi Thon Ngo* v. *INS*, 192 F.3d 390 (1999); see Pet. 23 n.14.[2]

---

[1] Contrary to respondent's contention (Br. in Opp. 17), the fact that, in light of *Ho*, an alien has sought initial en banc consideration in another case raising the same issues in the Tenth Circuit does not render the square conflict between the Ninth and Tenth Circuits unripe for review. To the contrary, it confirms that *Ho* is now binding circuit precedent. Furthermore, although Judge Brorby, in his dissent in *Ho*, disagreed with the majority's constitutional ruling, he agreed with the majority that the "plain language" of Section 1231(a)(6) authorizes the Attorney General to detain aliens in circumstances such as these pending their removal. 204 F.3d at 1060. There accordingly is no reason to believe that the Tenth Circuit would change its view on the statutory issue even if it granted rehearing en banc on the constitutional issue.

[2] The Third Circuit held in *Ngo* that the text of Section 1231(a)(6) authorizes the Attorney General to detain an alien beyond the 90-day removal period even where the progress toward the alien's ultimate removal is "agonizingly slow." 192 F.3d at 398. As respondent points out (Br. in Opp. 16 n.16), *Ngo* involved an excludable alien rather than an alien, like respondent, who previously was a lawful permanent resident. Section 1231(a)(6), however, now governs the detention of aliens in both categories. Although the Third Circuit stated in the portion of its opinion rejecting a constitutional challenge to the detention that it was not addressing the situation of aliens other than those who are excludable (see 192 F.3d at 398 n.7), it did not suggest that the text of Section 1231(a)(6) would apply differently to the two categories of aliens as a statutory matter.

The result in this case likewise cannot be reconciled with *Zadvydas*, which upheld the continued detention of an alien in comparable circumstances. The Fifth Circuit in that case did not question the Attorney General's statutory authority to detain the alien, see 185 F.3d at 286 (Section 1231(a)(6) "authorizes detention but makes it discretionary beyond an initial ninety day period"), and it held that the alien's continued detention (subject to periodic review of his dangerousness and flight risk) comported with due process, even though there was not yet a country willing to accept his return and it would be "difficult at best" to locate such a country. *Id.* at 291. The Fifth Circuit concluded that, "[g]iven the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is *impossible*." *Id.* at 294. (emphasis added). It is clear that *Zadvydas* would be resolved differently by the Ninth Circuit, which requires the immediate release of an alien who cannot be removed in the reasonably foreseeable future. See Pet. App. 31a.

In the response we filed last May to the certiorari petition in *Zadvydas*, we pointed out that the result in that case is inconsistent with the result reached by the Ninth Circuit in this case. 99-7791 Br. in Opp. 16. We nevertheless opposed review in *Zadvydas* at that time because no court of appeals had reached a contrary result on the constitutional issue, the Fifth Circuit had not addressed (and the petitioner did not present to this Court) the statutory argument raised by respondent in this case, and review by the Court of the constitutional issue in *Zadvydas* would be premature in light

of the conflicting rulings by the Ninth and Tenth Circuits on the antecedent question of statutory interpretation, which the government had then sought to eliminate by filing a petition for rehearing en banc in this case. *Id.* at 16-18. Subsequently, however, we informed the Court by letters dated June 9 and 20, 2000, that the Ninth Circuit had denied rehearing en banc and that the Solicitor General had authorized the filing of a certiorari petition in this case. The Court did not act on the certiorari petition in *Zadvydas* after we submitted those letters, and it remains pending.

We have now concluded – in light of the denial of rehearing en banc in this case, the subsequent filing of this certiorari petition and respondent's brief in opposition—that the Court should grant certiorari in *Zadvydas* as well as in this case. In his brief in opposition in this case, respondent places central reliance on the argument that the Ninth Circuit's statutory interpretation is supported by the doctrine that statutes should be interpreted in a manner that avoids a serious constitutional question See Br. in Opp. i, 3, 11, 14, 18-19, 26, 31-32. Because the constitutional arguments that respondent relies upon in defense of the Ninth Circuit's statutory ruling were rejected by the Fifth Circuit in *Zadvydas*, we believe that it would be appropriate for the Court to grant certiorari in this case and in *Zadvydas* to resolve both the statutory and the constitutional challenges to detention under Section 1231(a)(6) at the same time.

Respondent misapplies the constitutional avoidance doctrine by repeatedly characterizing his detention as "indefinite," which in his view raises a serious constitutional question in these circumstances. See Br. in Opp. i, 3, 11, 18, 20, 26, 28, 30, 32, 34. As we explain in the certiorari petition (at 26), however, the comprehensive administrative procedures for review of aliens in respondent's position (see 8 C.F.R. 241.4; Pet. App. 64a-76a, 90a-91a) forecloses any characterization of his detention as permanent or indefinite. Pet. 26-28. Respondent was afforded an ongoing possibility of

release if he no longer posed a risk of danger or flight. And INS's detention of respondent will necessarily cease upon his removal from this country—a matter on which progress is continuing to be made through international negotiations (see Pet. 17 n.10).[3] See *Zadvydas*, 185 F.3d at 291, 294 (alien's prolonged detention pending removal is not permanent or indefinite because the alien "may be released when it is determined that he is no longer either a threat to the community or a flight risk"; the alien is entitled to automatic, periodic administrative review of his custody; and it has not been clearly established that there is no meaningful possibility of locating a country that would accept the alien's removal or that removal is "impossible"). In any event, the Ninth Circuit's statutory interpretation is not limited to "indefinite" detention; it prohibits even one day of detention of an alien in respondent's position.

2. Quite aside from the existence of conflicting rulings in other circuits, the adverse impact of the decision below

---

[3] Respondent's discussion (Br. in Opp. 36-37 & nn.33, 34) of information concerning the government's ongoing negotiations with Cambodia over return of its nationals disregards the reality that the Executive Branch is dealing with ever-shifting international conditions and relations with various countries that are always difficult to predict, and it highlights the difficulties presented by a rule that requires federal courts to make their own predictions about the likelihood of removing aliens to particular countries. See Pet. 16 n.9, 29-30.

Published INS statistics show that the INS successfully removed two Cambodian nationals in fiscal year 1994, 14 in 1995 (two of whom were criminals), four in 1996, and ten in 1997. *1997 Statistical Yearbook of the Immigration and Naturalization Service* 180, 183 (Oct. 1999). We have been informed by the INS that the two removed in 1994, ten of the 14 in 1995, one of the four in 1996, and two of the ten in 1997 were removed to Cambodia. We have been further informed by the INS that it removed 16 Cambodians to Cambodia in 1998, 13 in 1999, and seven in the first ten months of fiscal year 2000. The INS's ability to remove such aliens was based on varying circumstances, such as possession of current travel documents or the alien's family obtaining travel documents directly from the Cambodian government.

within the Ninth Circuit itself has grown substantially even since the certiorari petition was filed. See Pet. 15-16. As of September 15, 2000, there are approximately 487 habeas corpus actions currently pending in the district courts in the Ninth Circuit and approximately 149 appeals currently pending in the Ninth Circuit involving legal issues that are the same or substantially similar to those presented by this case, and the Ninth Circuit has already summarily affirmed district court release orders in eleven additional cases in light of the decision below. So long as the Ninth Circuit's decision in this case stands as controlling precedent in that Circuit, the district courts are required in such cases to order the release by the INS of any alien who is situated similarly to respondent, regardless of the degree of danger or risk of flight he presents if released.

Respondent attempts to discount that broad impact by asserting (Br. in Opp. 14) that the courts in the Ninth Circuit are not summarily releasing aliens, but "continue to reach individualized release decisions based upon the facts of the particular case." See also *id.* at 23; Br. in Opp. App. 21a-24a. Those assertions are misleading. Under the Ninth Circuit's ruling, the facts pertaining to the risk of danger or flight posed by the release of a particular alien are wholly irrelevant if a court determines that there is not a reasonable likelihood that the alien will be removed in the reasonably foreseeable future. Pet. App. 23a, 25a. Accordingly, when a court finds that there is not a reasonable likelihood of removing an alien in the reasonably foreseeable future, the alien is ordered released, *regardless* of the basis for the Attorney General's decision under Section 1231(a)(6) to detain the alien. Indeed, respondent himself elsewhere insists (Br. in Opp. 4 n.2) that the risk of danger or flight posed by his release is not relevant to the question of statutory construction presented by this case—an assertion that cannot be squared with Section 1231(a)(6)'s express authorization for the Attorney General to detain an alien

"who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal."

3. Respondent contends (Br. in Opp. 13, 21-22) that this Court's review of the statutory question should await the INS's adoption of its final regulations further formalizing the administrative process for periodic review of decisions to detain aliens such as respondent under Section 1231(a)(6). Respondent suggests (Br. in Opp. 13) that "the INS may remedy any present conflict on its own," and asserts (*id.* at 21 & n.21) that the final regulations adopted by the INS may be consistent with the Ninth Circuit's ruling. That suggestion is without merit.

The very premise of the proposed regulations is that the Attorney General *does* have the authority, as both a statutory and a constitutional matter, to detain aliens like respondent, who cannot be returned to their country of nationality for the time being, but who are aggravated felons or aliens found by the Attorney General to pose a risk of flight or danger to the community if released. 65 Fed. Reg. 40,540 (June 30, 2000). The proposed regulations are designed to clarify and codify the procedures for deciding how to exercise that authority. Any delay in resolving questions concerning the scope of the Attorney General's authority under Section 1231(a)(6) will undermine the validity of the INS's regulations, which are designed to ensure the even-handed exercise of that authority nationwide. Indeed, if the Ninth Circuit's ruling remains binding precedent, courts will require the Attorney General to release all aliens in respondent's position in that circuit, without the exercise of the individualized judgment and discretion that Section 1231(a)(6) expressly contemplates and that her proposed regulations are designed to implement.

4. Respondent argues (Br. in Opp. 23-25) that further review of this case is not warranted because continued detention of criminal aliens such as respondent is not necessary.

Respondent asserts that the INS is "still able to supervise" aliens after they are released and is able to "compel their appearances." *Id.* at 23. But supervision conditions can be violated, as they were by respondent when he assaulted a female companion, thus posing a danger to the community. That is why the INS's custody determination takes into account, among other things, the alien's probation history and evidence of any rehabilitative effort or recidivism. See 8 C.F.R. 241.4(a); Pet. App. 78a. Similarly, every year many criminals and aliens fail to respond to notices to appear for various legal proceedings. That is why the INS's custody determination takes into account any history of failures to appear. 8 C.F.R. 241.4(a); Pet. App. 78a. In any event, respondent simply ignores the fact that Congress explicitly provided that an alien's "risk to the community" and likelihood of "comply[ing] with the order of removal" are factors the Attorney General may take into account in making detention decisions under Section 1231(a)(6).

Respondent's fact-bound attempts (Br. in Opp. 4 n.2; 7 & nn.8, 9; 8 n.10; 10 n.12; 21 n.21; 24-25 & nn.25, 26) to convince the Court that the INS's continued detention of him was not necessary because he did not pose a danger to the community and would abide by release conditions ignore both the record in this case and the fact that, under the court of appeals' ruling, the INS is prohibited from detaining respondent and all other aliens comparably situated *whether or not* they pose a serious danger to the community or would comply with release conditions.[4]

[4] The letter informing respondent of the INS's decision to continue him in detention specifically noted that, in making that decision, the assistant district director considered numerous factors, including respondent's criminal convictions, "[o]ther criminal history," "[e]vidence of rehabilitative effort or recidivism," and "[p]rior immigration violations and history." Pet. App. 78a. As we have explained (Pet. 6 n.2), respondent's immigration file revealed that he had been associated with a gang "for some time" and had been arrested on two other occasions with one of the codefendants in his manslaughter case (see A.R. 50), contrary to respondent's assertion (Br. in Opp. 7 n.8) that his history of gang activities "consists solely of the manslaughter offense for which he was convicted." The record also revealed that the immigration judge who had refused respondent's request for release while his removal proceedings were pending had found that respondent posed a danger if released because of the lack of any evidence that he had been rehabilitated during his state imprisonment term and because he had denied his involvement in gang activity, denied knowledge of the killing, and denied abusing drugs, despite information to the contrary. See Pet. 6. Finally, respondent's post-release arrest on charges of assaulting a female companion reflects his continued involvement in violent conduct that the State is attempting to prosecute through its appeal of the dismissal of those charges. See Pet. 13 n.6; Br. in Opp. 10 n.12.

5. As we demonstrate in the certiorari petition (at 17-23), the court of appeals' construction of Section 1231(a)(6) is fatally flawed. The court rewrites an unambiguous statutory provision that was specifically designed, following a series of legislative amendments, to authorize the Attorney General to detain dangerous criminal aliens who are under final orders of removal.

The court of appeals' interpretation of Section 1231(a)(6) to allow detention beyond the 90-day period only for a "reasonable" time, Pet. App. 25a, finds no support in the text of the statute. To the contrary, the statute's text, structure, and history reveal that Congress intended that the Attorney General be authorized to detain aggravated felons and aliens who she found to pose a risk to the community or a likelihood of noncompliance with the removal order. Pet. 17-23.

In defending the Ninth Circuit's addition of a judicially fashioned "reasonable" time limitation to Section 1231 (a)(6), respondent relies (Br. in Opp. 27-28, 30) on lower-court decisions rendered approximately 70 years ago under statutory provisions repealed in 1952. Those long-since superseded statutory provisions and decisions have no bearing on the present question.

As we explain in the certiorari petition (at 18-22), since at least 1990, Congress has unequivocally exempted the deten-

tion of aggravated felons following entry of a final order of deportation from any statutory time limit that applied generally to other aliens. Indeed, Congress has consistently allowed, and at times *mandated*, that the Attorney General continue to detain aggravated felons. Nothing in the last decade of amendments to the Immigration and Nationality Act suggests that Congress intended that after 1996, instead of having six months to effectuate removal with varying degrees of authority to detain criminal aliens thereafter, as under prior law, the Attorney General would now be subject to a judicially imposed limitation of only a "reasonable" time beyond 90 days, which in this case was deemed no time at all.

To the extent respondent identifies any ambiguity in the statute (see Br. in Opp. 26), however, that is no basis for adoption of the court of appeals' interpretation. Rather, it is the INS's plainly reasonable interpretation of Section 1231 (a)(6) that is entitled to judicial deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), and *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999). See Pet. 18.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and the case should be consolidated for oral argument with *Zadvydas* v. *Underdown*, No. 99-7791, in which we are today filing a supplemental brief suggesting that the Court grant certiorari in that case as well.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

SEPTEMBER 2000

AMICUS CURIAE

BRIEF

IN THE
SUPREME COURT OF THE UNITED STATES

No. 00-38

JANET RENO, *et al.*,

Petitioners,

v.

KIM HO MA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this brief; their letter of consent has been lodged with the Clerk of the Court. Counsel for Respondent Kim Ho Ma has declined to consent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many

supporters who live within the Ninth Circuit. WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to combat illegal immigration and to ensure that aliens who engage in criminal activities are excluded from American society. *See, e.g., Reno v. American-Arab Anti-Discrimination Committee,* 119 S. Ct. 936 (1999); *Ogbomon v. United States,* 117 S. Ct. 725 (1997); *Immigration and Naturalization Service v. Elramly,* 117 S. Ct. 31 (1996). WLF also filed a brief in the Ninth Circuit in support of the petition for rehearing in this case.

AEF is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* before the Court on immigration-related issued on a number of occasions.

As a result of the Ninth Circuit's decision in this case, a criminal alien at this moment is walking freely on the nation's streets, despite having been convicted of a homicide, despite being subject to a final order of deportation, and despite repeated INS determinations that he is a danger to the community. Moreover, as Petitioners' brief notes, hundreds of other dangerous criminal aliens may also soon be foisted on the public as a result of the Ninth Circuit's decision. *Amici* seek to file an *amicus curiae* brief in this case because they fear for the public safety if the panel's decision is allowed to stand.

Amici have long been involved in efforts to protect the general public from criminal activity and to promote the rights of those who fall victim to crime. The Ninth Circuit's decision discusses at great length the alleged statutory rights

of a convicted killer, but does not seem to have taken into account the rights of those who are threatened by Kim Ho Ma's continued presence in American society. *Amici* believe that if they are allowed to participate in these proceedings, their brief will provide a perspective that is distinct from that of any of the parties.

For the foregoing reasons, the Washington Legal Foundation and the Allied Educational Foundation respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: August 7, 2000

QUESTION PRESENTED

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. § 1231(a)(6) if the alien cannot be removed from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released, and the alien's custody is subject to periodic administrative review.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. THE CASE RAISES IMPORTANT PUBLIC SAFETY ISSUES THAT MERIT REVIEW 6

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OTHER APPELLATE DECISIONS AND IS INCONSISTENT WITH THE PLAIN LANGUAGE OF § 1231(a)(6) 9

III. THE FEDERAL COURTS LACK JURISDICTION TO REVIEW DECISIONS OF THE ATTORNEY GENERAL TO DETAIN ALIEN CRIMINALS PENDING REMOVAL 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases:

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 10
Ho v. Greene, 204 F.3d 1045 (10th Cir. 2000) 12
INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) 10
INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 11
Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999) 15, 16
Reno v. American-Arab Anti-Discrimination Committee, 119 S. Ct. 936 (1999) 13
United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 10
Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999), *petition for cert. pending*, No. 99-7791 12

Statutes and Regulations:

Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104-208 11

8 U.S.C. § 1101(a)(43)(F) 2
8 U.S.C. § 1226 . . . . . 13, 14, 15
8 U.S.C. § 1226(c) 13, 14, 15, 16

Page

8 U.S.C. § 1226(c)(1) 14, 15
8 U.S.C. § 1226(c)(1)(B) 2, 14
8 U.S.C. § 1226(c)(2) 2, 14
8 U.S.C. § 1226(e) 13, 14, 15, 16
8 U.S.C. § 1227(a)(2)(A)(iii) 2, 14
8 U.S.C. § 1231(a)(2) 3
8 U.S.C. § 1231(a)(6) . . . . . *passim*
8 U.S.C. § 1252(g) 13

28 U.S.C. § 2241 . . . . . 4, 15

8 C.F.R. § 241.2 . . . . . 3, 11
8 C.F.R. § 241.4 . . . . . 3, 11

Miscellaneous:

M. Hedges, "Criminal Aliens Often Released Instead of Deported," Scripps Howard News Service, March 9, 2000 8

Los Angeles Countywide Criminal Justice Coordinating Committee, "Impact of Repeat Arrests of Deportable Aliens in Los Angeles County," July 15, 1992 . . . . . 7, 8

Senate Committee on Government Operations, "Criminal Aliens in the United States," 104 S. Rpt. 48 (April 7, 1995) 12

65 Fed. Reg. 40540 (June 30, 2000) 3

IN THE
SUPREME COURT OF THE UNITED STATES

No. 00-38

JANET RENO, *et al.*,
Petitioners,

v.

KIM HO MA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set forth in the motion accompanying this brief.[1]

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby incorporate the Statement contained in the Petition for a Writ of Certiorari.

In brief, Kim Ho Ma is a 23-year-old Cambodian national who has been a permanent resident of the United States since 1987. In April 1995, Ma, along with four other gang members, ambushed and shot a fellow gang member and left him to bleed to death. Ma was arrested and charged with murder. At his 1996 trial, the jury could not reach a verdict on second-degree murder charges and convicted Ma of first-degree manslaughter. Petition Appendix ("Pet. App.") 56a. Ma was not retried on the second-degree murder charge.

After serving 26 months of his 38-month sentence, Ma was released from State custody in June 1997 and transferred to the custody of the Immigration and Naturalization Service ("INS"). In July 1997, the INS charged Ma with being subject to removal under 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien who had been convicted of an aggravated felony. Ma contested the removal proceedings, but the INS issued an order of removal for Ma, which became final on October 26, 1998. Pet. App. 5a. Throughout the removal proceedings, Ma remained in the custody of the INS, which is *required* by law to detain -- pending removal -- any alien who has been convicted of an aggravated felony. 8 U.S.C. § 1226(c)(1)(B).[2]

[2] It is uncontested that Ma's homicide falls within the "aggravated felony" category. *See* 8 U.S.C. § 1101(a)(43)(F). Section 1226(c)(2) provides for the release of aliens detained pursuant to § 1226(c)(1)(B) only under very limited circumstances not relevant to this case.

After the removal order became final, the INS began the process to remove Ma to Cambodia. To date, Cambodia has not issued the requisite travel papers for Ma. Although U.S. and Cambodian officials have met to discuss a repatriation agreement between the countries, "Ma's deportation to Cambodia is far from imminent." Pet. App. 59a.

For the first 90 days following the date on which Ma's order of removal became final, the INS continued to detain *Ma* pursuant to 8 U.S.C. § 1231(a)(2), which *requires* that, during that 90-day period, the INS detain any alien who has been determined removable based on commission of an aggravated felony. Thereafter, the INS detained Ma pursuant to 8 U.S.C. § 1231(a)(6), which provides that *any* such alien "may be detained beyond the [90-day] removal period."[3]

Although § 1231(a)(6) grants the INS authority to detain beyond the 90-day removal period *any* alien deemed removable based on commission of an aggravated felony, the INS has not chosen to exercise its detention powers as sweepingly as permitted by the statute. Rather, INS regulations provide that the INS will not necessarily detain such aliens past the 90-day removal period unless they are deemed a threat to the community or a risk of flight. *See* 8 C.F.R. § 241.4, Pet. App. 90a-91a. *See also* INS Proposed Rule, "Detention of Aliens Ordered Removed," 65 Fed. Reg. 40540 (June 30, 2000). INS regulations also provide for periodic review of the cases of all removable aliens being held beyond the 90-day removal period. 8 C.F.R. § 241.2.

[3] Section 1231(a)(6) *also* authorizes the INS to detain removable aliens beyond the 90-day removal period if the Attorney General determines the alien "to be a risk to the community or unlikely to comply with the order of removal."

criminal aliens; given that background, it is inconceivable that Congress intended (as the Ninth Circuit held) to *relax* detention rules for removable aliens who have been convicted of a aggravated felony.

Finally, there is serious question whether the federal courts possess subject matter jurisdiction to consider Ma's claim that the INS detained him in violation of § 1231(a)(6). The Court should grant review in order to consider that important jurisdictional question as well.

I. THIS CASE RAISES IMPORTANT PUBLIC SAFETY ISSUES THAT MERIT REVIEW

Kim Ho Ma is a convicted killer. The Ninth Circuit did not contest that by virtue of having committed a homicide, Ma has forfeited his right to remain a part of American society. But given the current relationship between the United States and Cambodia, immediate deportation of Ma to Cambodia is not a realistic prospect. Thus, either Ma must be detained by the INS for the near-term until his removal can be arranged, or a convicted killer must be released into American society.

The Ninth Circuit ruled that Congress, in adopting § 1231(a)(6), came down against detention of criminal aliens whose removal cannot be effected within 90 days of a final order of removal because their native country will not take them back. Regardless whether that ruling is a proper reading of § 1231(a)(6), it is uncontestable that the ruling raises serious public safety issues. The importance of those issues is reason enough by itself to grant the petition.

As the Petition points out, the Ninth Circuit's decision is having a significant impact on the cases of numerous

criminal aliens besides Ma. The INS has appeals pending in 59 Ninth Circuit cases in which criminal aliens have been ordered released from detention under circumstances similar to Ma's, and is preparing to file notices of appeal in another 40 cases. Pet. 15. Moreover, there are 400 other cases raising similar challenges to detention in various district courts in the Ninth Circuit. Pet. 16. In light of the Ninth Circuit's ruling in this case, one can expect that each of those criminal aliens will be released from detention unless this Court grants review. If other federal appeals courts decide to adopt the Ninth Circuit's rationale, the disruption of customary immigration law enforcement could spread nationwide.

It is no answer to such concerns to assert that no one can be certain that those released into society will continue their life of crime. *See, e.g.*, Dist. Ct. Opinion, Pet. App. 60a (the government "has failed to advance a single reason for its belief that [Ma] is a danger to society, beyond the simple fact of his conviction."). To the contrary, it is a *statistical certainty* that a significant percentage of criminal aliens who are subject to a final order of removal will, if released, engage in criminal activity.

A recent major study of criminal aliens conducted by Los Angeles County concluded that a significant percentage of deportable aliens released from jail are rearrested within one year, before their deportation can be effected. Los Angeles Countywide Criminal Justice Coordination Committee, "Impact of Repeat Arrests of Deportable Aliens in Los Angeles County" [hereinafter, "Impact"], July 15, 1992. The study traced the activity of 1,875 inmates released from Los Angeles County jail in May 1990 who had been identified by the INS as "deportable aliens." Of those 1,875, 772 had been rearrested *within one year* (40%),

and those 772 had been arrested a total of 1,522 time. Impact at iv. Moreover, those figures likely considerably understate the rearrest rate, because 974 of the 1,875 criminal aliens were actually deported at or soon after the time of their release. *Id.* If those 974 individuals are eliminated from the study on the assumption that they were not on the streets long enough prior to deportation to have been arrested, then the actual one-year rearrest rate rises to 86% (772 out of 901).

Recent congressional hearings have focused on high recidivism among criminal aliens released by the INS. INS Commissioner Doris Meissner testified at a March 2000 hearing of the House Appropriations Subcommittee on Commerce, Justice, State and the Judiciary that between October 1994 and May 1999, the INS released 35,318 criminal aliens rather than detaining them pending deportation. Meissner testified that 11,605 of those released have gone on to commit "serious crimes," including at least 1,376 who committed "violent crimes." M. Hedges, "Criminal Aliens Often Released Instead of Deported," Scripps Howard News Service, March 9, 2000. Those 1,376 individuals committed a total of 1,845 violent crimes, including 98 homicides, 142 sexual assaults, 44 kidnappings, 346 robberies, and 1,214 assaults. *Id.*

Respondent Ma can be added to that list of recidivists. Following his October 25, 1999 release from detention, Ma was arrested on March 30, 2000 for a vicious assault. Ma is free on bail while Washington State authorities continue to pursue those charges. Pet. 13.

In sum, statistical evidence demonstrates conclusively that the Ninth Circuit's decision, by increasing the number of alien criminals released from detention pending removal,

will lead to a measurable increase in crime, including violent crime. The public safety concerns raised by the imminent release of hundreds of criminal aliens covered by the Ninth Circuit's decision warrant review of this case.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OTHER APPELLATE DECISIONS AND IS INCONSISTENT WITH THE PLAIN LANGUAGE OF § 1231(a)(6)

The Court should also grant review because the decision below conflicts with the decision of at least two other federal appellate courts and conflicts with the plain language of 8 U.S.C. § 1231(a)(6).

Section 1231(a)(6) provides that any removable alien who (such as Ma) has been convicted of an "aggravated felony" "may be detained beyond the [90-day] removal period" by the INS. The Ninth Circuit correctly noted that the provision does not specify a time limit on the length of any detention following expiration of the removal period. But the Ninth Circuit drew an unwarranted conclusion from the absence of a time limit; it concluded that one could draw no inference regarding congressional intent from the absence of a time limit. Pet. App. 10a. The court thought the statutory language could equally plausibly be read as authorizing detentions to continue indefinitely, "for a reasonable time," or some other temporal measure. *Id.* The language of § 1231(a)(6) cannot plausibly be read in that manner. When a statute authorizes a government agency to do something under specified circumstances (*e.g.*, detain removable aliens who have been convicted of an aggravated felony), there is no reason to infer a congressional limit on the period of time within which the agency is authorized to act, in the absence of language imposing such a time limit.

Such an inference is particularly unjustified in the case of § 1231(a)(6). Congress authorized the detention of removable aliens who have committed an aggravated felony beyond the 90-day removal period because of a concern that such felons would commit other crimes if released. That concern does not lessen simply because one month, six months, or six years have elapsed since the expiration of the removal period. Accordingly, there is *no* reason to infer that Congress intended to impose a time limit on the detention of such removable aliens.

In any event, the INS's conclusion that § 1231(a)(6) authorizes indefinite detentions is a plausible interpretation of that statute. The INS's conclusion is entitled to deference, particularly in light of the broad powers granted to the political branches of government in immigration-related matters. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Ninth Circuit concluded that such deference is unwarranted in cases in which the doctrine of "constitutional doubt" arises. Pet. App. 10a n.13. But that conclusion robs the political branches of the broad discretion they are due regarding immigration policy. The Court has made plain that the deference to which the political branches of government are entitled extends not merely to the interpretation of ambiguous statutes but also to the drawing of lines between constitutional and unconstitutional government policy. For example, the Court has long held that immigration-control personnel are not held to the same constitutional standards as other law enforcement officials. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (denying a Fourth Amendment challenge to Border Patrol highway checkpoints at which cars were randomly stopped even in the absence of individualized suspicion of criminal activity; the need to

secure areas near the border outweighs citizens' Fourth Amendment interest in not being stopped). *See also, INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (exclusionary rule does not bar use at deportation hearing of admissions made by alien following illegal arrest).

The INS's interpretation of § 1231(a)(6) is also entitled to deference because the INS is exercising its detention authority far more sparingly than the plain language of the statute would allow. On its face, § 1231(a)(6) permits the INS to detain beyond the removable period *any* removable alien who has committed an aggravated felony. However, the INS has issued regulations making clear that the only such removable aliens who will be subject to indefinite detention are those who are also determined to be a risk to the community or unlikely to comply voluntarily with the order of removal, and any detained alien is entitled to periodic review of such determinations. 8 C.F.R. §§ 241.2 and 241.4. In other words, the INS has chosen voluntarily to limit use of its indefinite detention powers to those aliens with respect to whom society's rationale for detention is strongest. The Ninth Circuit's conclusion that Congress could not possibly have intended such a result (Pet. App. 24a), even though that result is consistent with the statutory language and directly serves society's interests, warrants review by this Court.

Moreover, as the INS has pointed out, § 1231(a)(6) as interpreted by the Ninth Circuit would constitute a substantial restriction on the INS's previously existing detention powers. Yet § 1231(a)(6) was adopted in September 1996 as part of the Illegal Immigration and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, a law designed to hasten the removal of illegal

aliens and to protect citizens from alien criminals.[4] It is highly unlikely that such a law would have been a vehicle for Congress to decrease the INS's powers to detain removable aliens pending removal.

Finally, as the Ninth Circuit acknowledged (Pet. App. 20a n.23), its interpretation of § 1231(a)(6) is in direct conflict with the Tenth Circuit's interpretation. *Ho v. Greene*, 204 F.3d 1045, 1057 (10th Cir. 2000) (§ 1231(a)(6) "places no time limit on the detention of aliens whose detention it authorizes. . . . Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens . . . who cannot be removed within the ninety-day removal period."). The Ninth Circuit's belief that indefinite detention of removable aliens such as Ma raises serious constitutional problems conflicts with the rationale of the Fifth Circuit in *Zadvydas v. Underdown*, 185 F.3d 279 (5th Cir. 1999), *petition for cert. pending*, No. 99-7791, which rejected a constitutional challenge to indefinite detention under § 1231(a)(6). The Court should also grant review in order to resolve those conflicts.

---

[4] *See, e.g.*, Senate Committee on Government Operations, "Criminal Aliens in the United States," 104 S. Rpt. 48 (April 7, 1995) (recommending legislation to ensure increased detention of alien criminals prior to deportation). The report took issue with those, such as the district court (Pet. App. 60a), who are unwilling to accept, in the absence of direct evidence, that a removable alien who has committed an aggravated felony is a risk of flight. The report stated:

> Many criminal aliens who are released pending their deportation never appear for their deportation proceedings. In fact, over 20 percent of non-detained criminal aliens do not appear for their deportation proceedings. As of 1992, the INS reported to Congress that some 10,875 aliens convicted of aggravated felonies had failed to report for deportation proceedings.

III. THE FEDERAL COURTS LACK JURISDICTION TO REVIEW DECISIONS OF THE ATTORNEY GENERAL TO DETAIN ALIEN CRIMINALS PENDING REMOVAL

The Court should grant review in this case for the additional reason that the Ninth Circuit appears to have issued its decision despite lacking jurisdiction over the subject matter.

Before reaching the merits of Ma's claim that the INS may not detain him, the Ninth Circuit *sua sponte* considered whether it lacked subject matter jurisdiction to consider the claim as a result of the jurisdictional limitations imposed by 8 U.S.C. § 1252(g). The panel correctly determined that § 1252(g) does not preclude exercise of jurisdiction over this case. Pet. App. 3a n.3. *See Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936, 943-45 (1999) (§ 1252(g) does not preclude review of detention decisions). The panel failed to consider, however, the effect of another recently adopted statute that also imposes limitations on the exercise of jurisdiction in immigration cases: 8 U.S.C. § 1226(e). That statute is directly applicable to this case and precludes consideration of any statutorily-based objections to Ma's detention.

Section 1226, entitled "Apprehension and detention of aliens," grants the Attorney General (or her designate, the INS) extensive power to detain aliens pending deportation. In particular, § 1226[c] provides for the detention of "criminal aliens." It states that the INS "*shall* take into custody any alien who . . . is deportable by reason of having committed any offense covered in section . . .

237(a)(2)(A)(iii)." 8 U.S.C. § 1226(c)(1)(B).[5] Section 1226(c)(2) provides for the release of aliens detained pursuant to § 1226(c)(1) only under very limited circumstances that are not relevant to this case. Ma was taken into custody by the INS in 1997 pursuant to § 1226(c), following his release from state prison.

Congress has provided for extremely limited judicial review of decisions to detain aliens pursuant to § 1226. The judicial review provision states in relevant part:

> No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e).

The Ninth Circuit held that, notwithstanding Congress's *command* to the INS to take criminal aliens such as Ma into custody following completion of their prison sentences, Congress simultaneously mandated the release, 90 days after entry of a final removal order, of dangerous criminals who cannot be removed from the country because no country is willing to accept them. The panel based that holding on 8 U.S.C. § 1231(a)(6) -- notwithstanding the fact that § 1231(a)(6) is a confirmation of authority to the INS to continue to detain criminal aliens who cannot be removed within the 90-day removal period. In other words, the panel interpreted § 1231(a)(6) as a statutory limitation on the

---

[5] Section 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), provides for the removal of any alien convicted of an "aggravated felony" at any time after admission. As noted above, Ma does not contest that the crime for which he was convicted constitutes an "aggravated felony."

power (indeed, the mandate) that the INS otherwise would have had under § 1226(c) to detain Ma indefinitely.

In arriving at that counter-intuitive statutory interpretation, the panel acted in disregard of the limitation on its subject matter jurisdiction, as set forth in § 1226(e). That provision states unequivocally that "no court" shall set aside any INS action under § 1226 (including, as here, detention decisions under § 1226(c)(1)) "regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." The Ninth Circuit has done precisely that which § 1226(e) forbids: it has affirmed the district court's order overturning the INS's detention of Ma pursuant to § 1226(c)(1).

The court purported to exercise jurisdiction over this case under the statutory habeas corpus provision, 28 U.S.C. § 2241. But nothing in § 1226(e) suggests that Congress intended to create an exception for statutory habeas corpus petitions -- an exception that would, of course, essentially emasculate the limitation on jurisdiction. Rather, Congress used unequivocal language in barring federal court jurisdiction; "no court" quite clearly means "no court."

The Ninth Circuit's decision to exercise jurisdiction is in clear conflict with the rationale of a recent Seventh Circuit decision. In *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999), the Seventh Circuit addressed the habeas claim of a criminal alien being detained by the INS (pursuant to 8 U.S.C. § 1226(c)(1)) while he was appealing an administrative removal order. The alien contended that his continued detention during the appeals process violated his rights under the Due Process Clause of the Fifth Amendment. The INS argued that § 1226(e) precluded the court's exercise of jurisdiction over the case. The Seventh Circuit held that

§ 1226(e) prohibits courts from considering claims that the INS lacks authority under § 1226 to continue to detain an alien, but "does not purport to foreclose [constitutional] challenges to § 1226(c) itself." *Parra*, 172 F.3d at 957.[6] Thus, under the Seventh Circuit's rationale, the lower federal courts lack subject matter jurisdiction to hear claims (such as the claim recognized by the Ninth Circuit) that some federal statute limits the intended scope of § 1226(c). The Court should grant review in order to determine the scope of the federal judiciary's subject matter jurisdiction to hear statute-based challenges to INS decisions to detain removable aliens who have committed aggravated felonies.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court grant the Petition for a writ of certiorari.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: August 7, 2000

---

[6] Because the criminal alien in *Parra* was, in fact, challenging the constitutionality of his detention pursuant to § 1226(c), the Seventh Circuit determined that it possessed jurisdiction to consider that challenge, a challenge it summarily rejected.